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Homeownership for Low-Income Families: The Condominium

By STEPHEN D. TEAFORD*

Slum housing is the most visible dimension of urban poverty. Unlike the more subtle signs of malnutrition and crime, the enormity of the housing problem confronts every visitor to our ghettos. The 1960 Census classified as substandard 3.2 million occupied dwelling units in urban areas.¹ Fifty-five percent of those units were occupied by families with incomes under \$3,000; another 32 percent were occupied by families with incomes between \$3,000 and \$6,000.² These are the homes of the urban poor.

Perhaps because of this visibility, slum housing has received a good deal of political attention as the crisis in our cities has intensified. In the Housing and Urban Development Act of 1968, Congress has committed the federal government to the goal of producing 6 million housing units for a low- and moderate-income families over the next 10 years, enough to permit the replacement of substantially all substandard dwellings.³ Various existing housing programs, such as public housing and rent supplements, are expanded by this Act. The keynote of the new legislation, however, is the encouragement it provides for homeownership by families of low and moderate incomes. It is the implementation of this concept—homeownership for the poor—with which this paper is concerned.

The 1968 Act also adds to the National Housing Act a new section which provides for mortgage assistance to low- and moderate-income

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1. 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1960 CENSUS OF HOUSING pt. 1, at 1-20. These figures are for occupied units in Standard Metropolitan Statistical Areas. Housing is classified as "substandard" if it either is dilapidated or lacks some or all basic plumbing facilities. *Id.* at 3.

2. *Id.* at 1-20.

3. 42 U.S.C. §§ 1441(a)-(c) (Supp. IV, 1969); see *Hearings on Proposed Housing Legislation for 1968 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess., pt. 1, at 5-6 (1969) [hereinafter referred to as *1968 Hearings*].

families.⁴ Families eligible under this section can purchase their own homes with very small down payments, receive FHA mortgage insurance,⁵ and if their incomes are low enough, pay as little as one percent interest on their home mortgages. The Department of Housing and Urban Development (HUD) expects that this new legislation, together with existing programs, if fully funded, can permit the construction or rehabilitation of approximately 1.6 million homes within the next 10 years for ownership by families of low and moderate incomes.⁶

The reasoning behind this policy in favor of homeownership for the poor is clear. Particularly in the cities, the poor have long been the victims of their landlords—whether the ordinary slumlord or a public housing authority.⁷ The supply of housing for the low-income urban family has been so small that landlords could make good profits without repairing the buildings; in any event, their tenants could not afford the rents that would accompany substantial rehabilitation. Having no equity in their apartments, and resenting landlords who charge high rents and make few repairs, the poor have felt no compulsion to respect the buildings in which they live. Waste and vandalism result. As one building in a block begins to deteriorate, neighboring buildings command less rent and justify less maintenance; thus, the blight continues down the block. Tenants are evicted if they complain too much; and in public housing they may be evicted if their conduct or morals do not measure up to the standards of the housing authority.⁸ Inevitably, the evicted tenant will greet his next landlord with more suspicion and hostility. The solution to this serious problem is to give the low-income tenant the security and pride of owning his own home. As Robert Weaver, then Secretary of HUD, said in support of homeownership for those of low income: "To own one's own home is to have a sense of place and purpose. Homeownership creates a pride of possession, engenders responsibility and stability."⁹

Having decided in favor of a policy of homeownership for the

4. 12 U.S.C. § 1715z (Supp. IV, 1969). This section is discussed in the text accompanying notes 135-64 *infra*.

5. The 1968 Act relaxes FHA credit and neighborhood requirements for mortgage insurance for low- and moderate-income families. 12 U.S.C. §§ 1715z-2, 1715n (e) (Supp. IV, 1969). These new provisions are discussed in the text accompanying notes 188-89 *infra*.

6. 1968 *Hearings* pt. 2, at 1321. Publicly assisted homeownership programs accounted for 12,000 units during the last decade. *Id.* The actual number of such units to be constructed during the next decade depends primarily on appropriations.

7. See, e.g., C. ABRAMS, *THE CITY IS THE FRONTIER* 19-67 (1965).

8. See note 77 *infra*.

9. 1968 *Hearings* pt. 1, at 7.

urban poor,¹⁰ the problem is to choose the best form this "ownership" can take. Little consideration need be given the single family home. There is no doubt rehabilitation of single family homes will be an important part of any program aimed at improving housing conditions in low-income areas of central cities, and certainly some low-income families will be able to buy. But with the population of our cities increasing rapidly, and with the availability of building sites decreasing and their costs soaring, the single family home is not a good vehicle for a massive homeownership program for the urban poor.¹¹

A far less costly form of homeownership can be provided in a multiple family dwelling. This is attributable to the larger area of housing space per unit of land, the economies of large scale construction, and the common use and maintenance of exterior facilities. Clearly, as the cost of the home is decreased, more families at lower income levels can achieve homeownership.

Consideration will be given to the two common forms of homeownership in a multiple family building—the condominium and the cooperative—in order to assess and compare their desirability for low-income urban families. Consideration will then be given to the encouragement that federal housing legislation offers for the development of low-income condominiums.

I. Condominium or Cooperative for Low-Income Homeowners?

An abundance of articles discussing and comparing the condominium and the cooperative has appeared in the literature in recent years¹² and there is no need to duplicate these efforts. This article

10. In the discussion which follows the terms "poor" and "low-income" will be used interchangeably to refer to families for whom homeownership was never before financially practicable, but for whom it may now, with government assistance and new property concepts, become possible. We can for the sake of consistency adopt the outside limits of the federal mortgage assistance program: \$3,000 and \$7,000 per year. *1968 Hearings* pt. 1, at 67. The classification of any particular family as "low-income" will depend on its size and on cost levels in its area. For instance, a family earning \$7,000 a year would only be considered "low-income" if it were a large family in a high cost area.

11. "The F.W. Dodge Co., a construction information service of McGraw-Hill, Inc., has projected that apartment construction will comprise 40 percent of all housing built in 1975." Quirk, Wein & Gamberg, *A Draft Program of Housing Reform—The Tenant Condominium*, 53 CORNELL L. REV. 361, 365 n.20 (1968). In New York City about 73 percent of the population lives in dwellings containing three or more units and 55 percent of all rental units are in structures with 20 or more apartments. *Id.* See also Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 995 (1963).

12. See generally Berger, *Condominium: Shelter on a Statutory Foundation*, 63

will concentrate instead on those features of the condominium (as contrasted with the cooperative) which make it especially desirable for low-income families, and on those features which may be troublesome for low-income occupancy. In short, it will attempt to determine whether condominium homeownership provides the kind of property rights and legal relationships that would allow it to be an important vehicle in solving the housing problems of low-income families.

We may first summarize the basic features of the cooperative and the condominium. The stock cooperative is a nonprofit corporation that holds title to both the land and the building. Each cooperator buys stock in the corporation and receives a "proprietary" lease to an apartment. The corporation secures a blanket mortgage financing the project and assesses the cooperators on a monthly basis for their share of the carrying charges. It also assesses the tenant-shareholders for their shares of property taxes, maintenance expenses, defaults of other co-operators, reserves, and other charges authorized by ordinary corporate procedures.¹³

In the condominium, the apartment purchaser receives a deed conveying to him both a fee simple interest in his apartment and an undivided interest in the common areas and facilities. These interests are made subject to certain covenants, conditions, and restrictions contained in a recorded instrument which authorizes the election by the owners of a governing body to enforce the restrictions. The governing body manages the project, maintains the common areas, and assesses the apartment owners for their shares of management and maintenance expenses, unpaid assessments of other owners, reserves, and other charges authorized by the governing body or the association of owners.¹⁴

With these general characteristics in mind, we can turn now to specific features of the cooperative and the condominium that make

COLUM. L. REV. 987 (1963); Cribbet, *Condominium—Home Ownership for Megapolis*, 61 MICH. L. REV. 1207 (1963); Kerr, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1 (1963); Rohan, *Condominium Housing: A Purchaser's Perspective*, 17 STAN. L. REV. 842 (1965); Ross, *Condominium in California—The Verge of an Era*, 36 S. CAL. L. REV. 351 (1963); Walbran, *Condominium: Its Economic Functions*, 30 MO. L. REV. 531 (1965); *Federal Assistance in Financing Middle-Income Cooperative Apartments*, 68 YALE L.J. 542 (1959); Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299 (1962); Note, *The FHA Condominium: A Basic Comparison with the FHA Cooperative*, 31 GEO. WASH. L. REV. 1014 (1963).

13. See generally 4 R. POWELL, REAL PROPERTY 709-14 (1954).

14. A good statement of the various considerations involved in establishing a condominium is found in FHA, MODEL FORM OF MANAGEMENT AGREEMENT FOR CONDOMINIUMS (Form No. 3281, 1962).

these forms of homeownership more or less appropriate for low-income occupancy. For purposes of analysis, these features can be divided into three groups: (1) the separability of each individual's interest in both the premises and the mortgage; (2) the strength of community control and the security of personal rights as these meld to form a harmonious multiple-dwelling environment; and (3) financial considerations.

**A. The Separability of Each Individual's Interest
in Both the Premises and the Mortgage**

The key difference between the condominium and cooperative, as mentioned above, is that the purchaser of a condominium unit buys a fee interest in his own apartment, whereas the purchaser of a cooperative unit buys stock in the corporation that owns the building and leases him an apartment. A number of factors of concern to low-income families are based on this difference.

The Psychology of Homeownership

One of the primary reasons for preferring homeownership for low-income families is the psychological sense of dignity and respect for property which it reinforces. While there will be those who say that no one living in an apartment can feel like a homeowner, and that property interests do not affect an occupant's state of mind,¹⁵ it is submitted that a stronger psychological sense of ownership may be conveyed to the condominium purchaser than may be conveyed to the cooperative purchaser.¹⁶ The condominium purchaser will attend the formalities of closing, receive a deed, and secure a mortgage from the bank. If these are but *symbols* of participation in an economic system, it is an economic system from which low-income people have long been excluded.

Moreover, the psychological sense of ownership available to the condominium purchaser is not based on symbols alone. The condominium owner *does* have a larger bundle of property rights; his interest *is* more secure. For instance, unlike the cooperator, the condominium owner cannot be evicted; he can alter or improve his apartment as he desires while retrieving any enhancement of value upon resale; in short, he is closer to the "owner" end of the owner-tenant spectrum than

15. See, e.g., Note, *The FHA Condominium: A Basic Comparison with the FHA Cooperative*, 31 GEO. WASH. L. REV. 1014, 1036 (1963).

16. See Cribbet, *Home Ownership for Megalopolis*, 61 MICH. L. REV. 1207, 1237 (1963).

the cooperator. Thus, it seems reasonable to suppose that he will *feel* more like an owner, and less like a tenant, than the cooperator.

Financial Independence

Another key advantage of the separability of each individual's interest in the condominium and the cooperative is the high degree of financial independence that accompanies the former. Each condominium unit owner obtains his own mortgage and is therefore responsible only for that mortgage and not for the defaults of his neighbors. In addition, in most states real property taxes can be assessed separately against each condominium unit owner; thus, once again, the individual is not liable for the defaults of his neighbors.¹⁷

In the cooperative, on the other hand, the corporation obtains a blanket mortgage on the whole project and assesses the cooperators for their shares of the carrying charges. Hence, if a cooperator fails to pay his assessment, the other families must take on his share of the carrying charges. If enough cooperators fail to pay, the solvent members may not be able (or may not wish) to cover the obligations of their unfortunate or recalcitrant neighbors. In this event, the project mortgage will be in default and subject to foreclosure. Through no fault of his own, the cooperator may lose his downpayment, his accumulated equity, and his apartment. This degree of financial interdependence, whatever its significance for middle- or upper-income families, would be very dangerous for low-income families.¹⁸ Not only do low-income people by definition have fewer resources to draw upon, but their employment, and therefore their main source of income, is likely to be less regular than that of higher income groups.

It is frequently suggested that sufficient reserves can be accumulated to meet the threat of multiple defaults, but it is the cooperators

17. Explicit statutory provision for separate assessment of condominium units will be useful in most jurisdictions. See Berger, *supra* note 11, at 1020. A strong impetus for such legislation is provided by the FHA Model Statute provision that condominium units, including undivided interests, be separately assessed in order to be eligible for mortgage insurance. FHA, MODEL STATUTE FOR CREATION OF APARTMENT OWNERSHIP 15 (Form No. 3285, 1962).

18. Housing cooperatives did very badly in the depression, having a 75 percent foreclosure rate compared with a 20 percent home mortgage foreclosure rate during that period. Quirk, Wein & Gomberg, *supra* note 11, at 366. Co-ops have also fared badly during recessions, although in recent prosperity periods they have done very well. Due to the financial interdependence of cooperatives, however, a low-income tenant would be exposed to a greater foreclosure risk during a recession than would a low-income condominium owner. See Note, *The FHA Condominium: A Basic Comparison with the FHA Cooperative*, 31 GEO. WASH. L. REV. 1014, 1033 (1963).

who must pay for these reserves in the form of higher assessments. When defaults occur, the reserves are likely to be expended unless the cooperative corporation can sell the forfeited apartments at a premium.¹⁹

It may be that cooperatives can be made to work for low-income purchasers; but it is plain that the individual cooperator is subject to a serious risk of loss resulting from no fault of his own—a risk to which the condominium owner is not subject. Of course, the condominium owner (like the cooperator) is liable for the debts incurred by the governing body;²⁰ but ordinarily assessments for maintenance and management will constitute no more than one-third of the mortgage carrying charge. Moreover, in a period of economic crisis, maintenance expenses are flexible, whereas mortgage charges may not be.

Tailoring of Mortgage Terms and Refinancing

The separability of the condominium mortgage also permits the purchaser to secure a mortgage tailored to his own individual needs. The mortgagor can select a lender of his choice, the downpayment and other mortgage terms can be varied according to the desires of borrower and lender, a second mortgage can be arranged, and the mortgage can be prepaid or refinanced. All of these attributes make the condominium unit more desirable to the low-income purchaser.

The second mortgage, crucial to the low-income purchaser, involves a risk the cooperative corporation cannot take. Since the low-income purchaser is not likely to have any security against which to borrow, the ability to refinance will be especially useful when cash is suddenly needed. The co-op mortgage, of course, can be refinanced, but only upon a decision of the corporation. The seller of a co-op is at a distinct disadvantage in this regard. If he has built up any substantial equity²¹ and wishes to sell at a time when the corporation does not wish to refinance, he must either carry the purchaser himself, or find a purchaser with sufficient cash to let him out; neither the low-income seller or buyer is likely to be able (or willing) to assume the burden of this unmortgaged equity.

Section 213 of the National Housing Act, authorizing mortgage

19. See Quirk, Wein & Gomberg, *supra* note 11, at 366.

20. See FHA, MODEL FORM OF MANAGEMENT AGREEMENT FOR CONDOMINIUMS 1-3 (Form No. 3281, 1962). The possibility of incorporation and other problems of tort and contract liability will be discussed in the text accompanying notes 86-102 and in note 89 *infra*.

21. Equity is built up as the corporation pays back the principal debt and assesses the cooperator for his share of the amortization. See Berger, *supra* note 11, at 1017.

insurance for co-ops, was amended in 1964 to provide insurance for supplemental loans to cooperatives for the purpose of financing resales of co-op memberships.²² As a result, the seller's accumulated share of equity is paid to him through the proceeds of the loan and the buyer makes only the usual downpayment. Apparently the corporation, and therefore the cooperators as a group, bear the interest burden of the loan. As long as the corporation can be persuaded to borrow the money and the rate of apartment turnover is not too high, this form of refinancing should permit the resale of low-income co-op units, but certainly with less convenience and more expense than is involved in the resale and refinancing of a condominium unit.

Resale

Another benefit from the separability of interests in condominiums is the ability to resell the apartment at such profit as the market will bring. Cooperatives would not have to suffer a disadvantage in this respect, but cooperative by-laws usually curb resale prices.²³ Some, for example, restrict the selling cooperator to his downpayment;²⁴ others require him to offer his interest to the cooperative at "book value."²⁵

There is no legal necessity for cooperatives to limit the resale price of their shares.²⁶ It has been suggested that cooperatives might be more attractive if their proponents "would view cooperation as an experience in capitalism rather than fellowship."²⁷

Unlike cooperatives, condominiums are generally not subject to resale price restrictions. Indeed, considering the property rights of the condominium owner, resale price restrictions on a condominium unit might be held invalid restraints on alienation by the courts.²⁸ Of course, if the condominium owner has been assisted by the government

22. 12 U.S.C. § 1715e(j)(1)(C) (1964).

23. Berger, *supra* note 11, at 992-93.

24. *Id.* at 992.

25. *Id.* at 993 n.32. "Book value" is usually defined as the downpayment plus a pro rata share of amortization, both adjusted for cost of living increases. To come within section 213, cooperative by-laws must provide at the outset for such an option to purchase at book value, although it can later be changed or eliminated by a two-thirds vote of the membership, subject to FHA approval. *Id.* at 993.

26. These restrictions have been generally upheld, however, on the basis that a closely held commercial corporation may protect itself against hostile and disinterested persons becoming part of the management. See 12 W. FLETCHER, PRIVATE CORPORATIONS §§ 5452-56 (perm. ed. rev. vol. 1957).

27. Berger, *supra* note 11, at 992. See also *Federal Assistance in Financing Middle-Income Cooperative Apartments*, 68 YALE L.J. 542, 610 (1959).

28. First refusal options are generally upheld so long as their terms contain no stipulated price. See RESTATEMENT OF PROPERTY § 413(1) (1944).

in the form of land write-down, mortgage subsidies, tax abatement, or other benefits, the government may want to retrieve some of its costs and prevent private profit at its own expense.²⁹ Legislation could easily permit this.³⁰ However, barring government financial assistance, there is no reason why the first venture of low-income families into homeownership should not include one of the key advantages that homeownership has always held for higher income families—the ability to sell at such profit as the market will support. It has been contended that this “could have unfortunate consequences on the whole project”;³¹ however, if low-income condominium ownership is successful enough to permit a profit on resale, there will be an ample supply of builders and lenders prepared to offer more low-income apartments in other locations. It seems grossly unfair for the state to tell the low-income family that it may at last make an equity investment in our capitalist economy provided it does not take the gain which higher-income groups have always sought from their equity.

Advantages to Lenders

The separability of each individual's condominium mortgage offers advantages to lenders as well as purchasers. The lender can select the risks he wishes to assume; he does not, as in the cooperative, have to rely on the co-op corporation to make these selections. The lender can tailor the terms of the mortgage to the individual risk and can expand or limit his overall participation in the project as he chooses. The lender, like the purchaser, benefits from the financial independence of the apartments because he can foreclose on individual units without having to foreclose on the whole project.

From the lender's point of view, there is another very important advantage to the multiplicity of individual condominium mortgages. This is the advantage of direct contact with potential customers for a wide variety of banking or insurance services.³² Customer contact of this sort will not be so important in low-income projects as in higher income ones; but persons with low and moderate income do buy insurance, open bank accounts, and take out small personal loans.

29. Welfeld, *The Condominium and Median Income Housing*, 31 *FORDHAM L. REV.* 457, 479 (1963).

30. Section 235 of the National Housing Act now authorizes mortgage assistance payments, but provides no limitation on resale price. 12 U.S.C. § 1715z (Supp. IV, 1969).

31. Note, *The FHA Condominium: A Basic Comparison with the FHA Cooperative*, *supra* note 15, at 1036.

32. See Berger, *supra* note 11, at 998-99; Harrison, *The FHA Condominium*:

Closing and Servicing Costs

The multiplicity of condominium mortgages will involve greater costs than the cooperative in its creation, servicing, and foreclosure; yet in some respects, the sale and servicing of condominium mortgages will be less expensive than those associated with co-ops. The sale of stock in a cooperative project will generally be subject to the security regulations of state blue sky laws.³³ Condominium sales, on the other hand, usually will be regulated by the generally less demanding real estate laws, although it is possible that in some states the seller of condominium apartments would be held to be a seller of securities.³⁴

However, in the case of condominium units insured under the new mortgage assistance and co-op conversion programs, the low, FHA-required downpayment may be paid in either cash or its equivalent, and may be applied toward closing costs.³⁵ Hence, the impact of closing costs on persons purchasing condominium units under these programs will be greatly reduced.

Finally, there is no reason why brokerage costs on condominium units should be any higher than those on co-op units in the same price range.³⁶ In either case, the developer will decide initially whether or not to use real estate brokers in selling his apartments; and the co-op corporation or the association of condominium owners, as the case may be, can expend as much or as little effort as it chooses in assisting present members with the resale of their apartments. In urban renewal areas, the nonprofit developer-sponsor could probably obtain assistance from the local redevelopment or housing agency in selling units to low- or moderate-income families displaced from those areas.³⁷ In this way brokerage commissions on condominiums and cooperatives could be eliminated.

In conclusion, the separability of condominium mortgages provides a greater psychological sense of homeownership; it permits fi-

Use as a Means of Meeting the Need for Moderate-Income Housing, 11 N.Y.L.F. 458, 471 (1965).

33. See Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299, 338 (1962); Anderson, *Cooperative Apartments in Florida: A Legal Analysis*, 12 U. MIAMI L. REV. 13, 17 (1957). *Contra*, *State v. Silberberg*, 166 Ohio St. 101, 139 N.E.2d 342 (1956).

34. See Comment, *Community Apartments: Condominium or Stock Cooperative?*, *supra* note 33, at 338-39.

35. National Housing Act §§ 235(i)(3), 235(j)(4), 12 U.S.C. §§ 1715z(i)(3) (c), 1715z(j)(4)(c) (Supp. IV, 1969).

36. See Cribbet, *supra* note 16, at 1239.

37. Harrison, *supra* note 32, at 469.

nancial independence, the tailoring of mortgage terms, and the screening of borrowers by the lender, as well as individual refinancing and more convenient resale; it encourages the realization of a profit on resale and allows lenders to limit or expand their participation in a project as they wish; finally, it permits customer contact and freedom from intensive regulation. These various features of separability greatly enhance the attractiveness of the condominium for low-income families. Their importance to the lender and his low-income purchaser far outweighs the additional costs of separate closings and servicing.³⁸

B. Community Control and Personal Rights

Community apartments, whether condominium or cooperative, place large numbers of families in close proximity and necessitate the sharing of a variety of common facilities. The successful operation of these apartments demands a balancing of communal needs and personal rights. While the institutions available for enforcing communal obligations are much the same in the condominium and the co-op, and while the affirmative responsibilities of management are equally important in both types of community apartments, there are striking differences in the enforcement procedures available to each for policing delinquencies.

Community Requirements

To assure harmony in a multifamily apartment complex, a variety of obligations are incumbent on the occupants—some financial and some behavioral. First, the common areas must be maintained. These include such elements as the land, roofs, exterior walls, elevators, staircases, lobbies, halls, parking space, and commercial facilities. A variety of services must be provided and paid for by the apartment occupants as a group. They must pay jointly for insurance on the buildings and common areas and for any real estate taxes not severally assessed; reserves will be needed for unforeseen contingencies, such as acquiring an apartment by first refusal option or at foreclosure sale, or covering the assessments of delinquent members.³⁹ The community apartment occupants may also want to impose special assessments for capital improvement programs or for uninsured damages.

Second, rules of conduct must be observed if a large number of families are to live harmoniously in close proximity. The common

38. See Berger, *supra* note 11, at 998-99; Harrison, *supra* note 32, at 471.

39. The FHA requires such reserves in order to obtain condominium mortgage insurance. FHA, REGULATORY AGREEMENT 1 (Form No. 3278, 1964).

areas must not be obstructed; nuisances or other annoying activities must not be allowed; individual apartments must not be altered so as to endanger the structure as a whole; physical alterations in the common areas must not be made without the consent of all; and the apartments must be occupied for residential purposes only.⁴⁰ These rules must be enforced by the occupants as a group.

Institutions of Enforcement

Enforcement in the stock cooperative is effected naturally by the corporation that owns both the building and the common areas. The tenant-shareholders elect a board of directors which arranges for management by either hiring a professional manager or by directing indigenous management. The corporation, through this board of directors, assesses the tenants for their pro rata share of the common expenses and can also take action against delinquent tenants or those who violate house rules.⁴¹

In the condominium, on the other hand, there is no natural governing body because each occupant has title to his own apartment. Generally, a recorded declaration, incorporated by reference in each deed, authorizes the creation of an "association" of which each owner of a condominium unit is a member.⁴² This declaration, together with a set of association by-laws, sets forth the various rights and obligations of the members, including the election of a board which can either hire professional management or direct indigenous management.⁴³ The association and its board can assess the membership for the common expenses and can take action against delinquent owners or those who violate house rules.⁴⁴

Thus, community control through centralized management is feasible in both the cooperative and the condominium. The governing body and its goals are similar in both. The only structural difference in the institutions of government is in the franchise upon which they rest: Each cooperator has one share of stock and therefore one vote, whereas each condominium owner's vote is proportionate to the

40. For an example of some rules of conduct, see FHA, PLAN OF APARTMENT OWNERSHIP § 6, at 5-6 (Form No. 3277, 1964).

41. O. VOGEL, THE CO-OP APARTMENT App. A, § 18 (1960).

42. See FHA, PLAN OF APARTMENT OWNERSHIP MASTER DEED (Form No. 3276-A, 1968).

43. See FHA, PLAN OF APARTMENT OWNERSHIP (Form No. 3277, 1964) (containing model by-laws for condominiums).

44. See FHA, MODEL FORM OF MANAGEMENT AGREEMENT FOR CONDOMINIUMS (Form No. 3281, 1962).

value of his apartment in relation to the value of the other apartments.⁴⁵ The condominium franchise is probably more democratic insofar as the more valuable apartment is probably larger and houses more people; certainly lenders would prefer that their security have a vote proportionate to its worth. Basically, however, both the condominium and the cooperative provide for a central governing body that has affirmative responsibilities for managing the project and the "negative" responsibility of policing delinquent and deviant occupants.

Managing the Project

The affirmative functions of management (as distinguished from the negative function of policing delinquencies) are very much the same, both in purpose and technique, in the cooperative and in the condominium. These functions are crucial to our discussion because it is in this area that the condominium and cooperative alike can hold out important advantages to the whole undertaking of homeownership by low-income persons.

Property maintenance has long been a failing of low-income groups. Not only have families of low income lived in physically deteriorated housing, but their own maintenance of that housing, as can be judged by any visitor to our larger cities, has been abysmal both in terms of cleanliness and structural repair. It may well be that most, or even all, of this apparent lack of concern for property conditions can be attributed to landlords who charge exorbitant rents for low-income housing while at the same time ignoring housing codes and wilfully allowing their property to deteriorate. The tenants have little incentive to respect their "homes." Indeed, it is this situation that has prompted congressional favoring of homeownership for low-income families. Nevertheless, these families are inexperienced in owning and caring for their own property; and if homeownership were suddenly thrust upon them, some would fail to maintain their homes with the result that unfavorable "neighborhood effects" would again gradually cause an area to deteriorate.

The centralized management of community apartments offers the perfect solution to the maintenance problems of new low-income homeowners. The "bad apple" can no longer spoil the barrel and "neigh-

45. See FHA, PLAN OF APARTMENT OWNERSHIP MASTER DEED 4 (Form No. 3276, 1968). There seems to be no reason why cooperatives could not vote on a proportionate basis. This would only require that each cooperator be issued voting stock in proportion to the worth of his apartment. Yet, cooperatives all seem to be organized on a one-apartment, one-vote basis.

borhood effects" can be controlled. In the case of the condominium, this idea of centralized responsibility for property maintenance is applicable not only to the highrise or cluster "project," but also to the block of houses which a developer rehabilitates and sells to low-income purchasers.⁴⁶ These row houses can be sold as a condominium, or "homes association," in which covenants are put in the deeds authorizing the creation of a management group. The centralized board of the condominium or cooperative, as we have seen, is given the authority to hire professional management or direct indigenous management, and to assess the membership or shareholders for the expenses. Thus, assuming the board and those it hires are competent, and assuming effective enforcement procedures are available to assure sufficient funds, maintenance should be no problem for the common areas.

The selection of a competent board of directors is crucial to the success of a condominium or cooperative project. To assure self-government and taxation with representation, a majority of the board should be insiders (apartment owners). It is unlikely, however, that these people, many of them homeowners for the first time, will have the experience and knowledge necessary to assure successful management of the project. Consequently, in addition to the unit owners, representatives from local public agencies or FHA offices involved in the project, representatives from the principal lending institutions, and representatives from any nonprofit organization-sponsor should be included on the board.⁴⁷ Besides these logical sources of interested and knowledgeable directors, there are numerous lawyers, accountants, university professors, bankers, and businessmen who could be of great assistance in managing a housing project. Such persons are likely to be well-disposed toward this type of work because housing problems of low-income persons have been well-publicized in recent years. In this regard, the nonprofit sponsor could be most helpful in locating qualified and interested nominees for the board.

If the board elected is controlled by insiders, the problem of successfully operating a condominium or cooperative then becomes one of providing for effective management. Here the board has a choice: professional management, indigenous management, or some combination thereof.

The FHA condominium handbook provides that "under normal circumstances the proper and most efficient method for . . . operation [of a condominium] is through the retention of an experienced man-

46. 12 U.S.C. § 1715z (Supp. IV, 1969).

47. See Harrison, *supra* note 32, at 473.

agement agent."⁴⁸ The FHA model form of management agreement⁴⁹ is designed for use in the employment of professional management.⁵⁰ In addition to the FHA endorsement of professional management, conventional lenders favor it as well.⁵¹ Scholarly opinion also supports professional management; one writer has stated that cooperators "lack the competence to direct a large project by themselves. Their inexperience, factional disputes, and failure to evict delinquent tenants promptly have, in the large cooperatives, usually necessitated the employment of professional managers."⁵²

However, the attitude of the FHA, the lenders, and the scholars is based primarily on the experience with cooperatives and middle-income community apartments, not condominiums and low-income projects. These distinctions are important.

First, co-op management is necessarily more crucial to the success of the project, since it must account for carrying charges on the project mortgage in addition to maintenance, insurance and other incidental items. Thus, the co-op's assessment on an apartment is likely to be several times the condominium's assessment on an apartment of the same value. Because of this difference, as pointed out in the discussion of financial interdependence,⁵³ the delinquency of an apartment owner puts a much greater burden on the other owners of cooperative apartments than does such a delinquency on the other owners of condominium apartments. Co-op management will therefore have to be more efficient, and more businesslike, in its policing of delinquencies.

Secondly, professional management may be more appropriate for the middle-income community apartment, whether co-op or condominium, than for the low-income project. The higher income project can, of course, more readily afford professional services. Its management may be more complicated and more dependent on professional help than the low-income condominium. For instance, middle-income

48. FHA, CONDOMINIUM HOUSING INSURANCE AND SERVICING HANDBOOK pt. B, § 4.8 (1964).

49. FHA, MODEL FORM OF MANAGEMENT AGREEMENT FOR CONDOMINIUMS (Form 3281, 1962).

50. FHA, CONDOMINIUM HOUSING INSURANCE AND SERVICING HANDBOOK pt. B, § 4.2 (1964), provides that the model forms should be followed except for changes necessitated by the individual project or by local law. Any changes of substance must be approved by FHA.

51. Rohan, *Condominium Housing: A Purchaser's Perspective*, 17 STAN. L. REV. 842, 856 (1965).

52. *Federal Assistance in Financing Middle-Income Cooperative Apartments*, *supra* note 25, at 606; see also Rohan, *supra* note 47, at 855-56.

53. See text accompanying notes 17-20 *supra*.

projects may have swimming pools, steam baths and a variety of other services whose development and management requires professionals. Moreover, the occupants of these projects may show little interest in its management.⁵⁴

The low-income community apartment, on the other hand, less able to afford professionals and less in need of them anyway, may be a very good place for indigenous management. Indeed, when home-ownership for the poor is viewed as a social innovation for people who have long been excluded from the mainstream of our economy and our society, it will be recognized that some degree of self-management can be of a great intrinsic value. Low-income urban areas, often predominantly Negro, resound today with demands for control of their schools, poverty agencies, and government. Community action groups have been federally funded to encourage interest, self-knowledge, and influence in the community. A new form of racial separatism, demanded by the disadvantaged minority, has been based at least partly on the belief that self-management of one's own affairs can be a source of constructive pride. A new national administration has proposed "black capitalism" as a solution to the problems of Negro slums. Thus, community management has become a goal of the urban poor.

The community apartment is another way in which low-income urban families can develop and exercise a capacity for managing their own affairs. No doubt some amount of outside professional assistance will be required in areas like accounting and auditing where specialized training is essential. On the other hand, there are many areas in which low-income occupants can undertake major management responsibility.

The occupants can and should bear the responsibility for dealing with delinquent members. For too many years the public housing authority has made these decisions for the urban poor. Whether the problem is financial or behavioral, the community should judge and punish its own members.⁵⁵ The capacity for self-government which the urban poor so eagerly seek will never develop if this responsibility is delegated. Moreover, there seems to be no reason why low-income families cannot exercise this sometimes delicate responsibility effectively, assuming the ground rules have been clearly set forth in the by-laws, and a competent board of directors has been selected which will keep itself and its management informed of the financial and be-

54. See Rohan, *supra* note 51, at 855-56.

55. The enforcement procedures available to condominium and cooperative management will be discussed in the text accompanying notes 57-77 *infra*.

havioral delinquencies.⁵⁶

The more routine duties of management, including administrative paperwork, maintenance and repair work, and the hiring and firing of any outside personnel can also be performed by the apartment owners. Members would be compensated for what they do, which would in effect reduce their own assessments.

These suggestions are only examples of the types of arrangements that could be made within the community apartment for its own management. Of course, it may be that the membership of a low-income community apartment will not want to assume management responsibilities. The important idea is that low-income community apartment owners should be permitted to manage their own affairs.

Policing the Occupants

It is in the techniques available for policing delinquencies that the condominium and cooperative differ radically in their appropriateness for low-income occupancy. The greater security of tenure afforded by the condominium makes it a much more desirable form of homeownership for an economic (and often racial) group whose experiences with landlords have been frustrating and degrading.

The owner of a share of stock in a housing cooperative leases his apartment from the corporation. Upon his failure to pay an assessment when due, the cooperator may be subject to summary process for dispossession, frequently with only three days' notice.⁵⁷ If a requisite number of stockholders, usually 80 percent of the capital stock, determines that the cooperator's conduct is "objectionable," he may be evicted on a month's notice.⁵⁸ Any defense to such action is unlikely to succeed, so long as the procedural requirements of the corporate by-laws have been met. Moreover, such a defense would be costly and time-consuming.⁵⁹ Some procedures have been proposed to prevent arbitrary or discriminatory use of the eviction power in the stock cooperative. One writer has suggested that the expelled member should be given a right to appeal the board's or the membership's decision to

56. See FHA, PLAN OF APARTMENT OWNERSHIP (Form No. 3277, 1964) (containing model by-laws for condominiums).

57. See, e.g., CAL. CODE CIV. PROC. § 1161 (unlawful detainer, three days); CAL. CIV. CODE § 791 (right of re-entry, three days); CONN. GEN. STAT. § 52-532 (1968) (five days).

58. See Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299, 323 (1962).

59. See *Federal Assistance in Financing Middle-Income Cooperative Apartments*, 68 YALE L.J. 542, 608 (1959).

an "independent arbitrator, who would base his decision solely on the nature of the alleged violation."⁶⁰ If, however, the arbitrator is to conduct, in effect, a trial de novo, home rule in the co-op will be illusory. On the other hand, any other type of review, confined primarily to legal issues, is not likely to detect arbitrariness or discrimination since these will be factual matters. As suggested above,⁶¹ one of the principal advantages of community apartments is the responsibility they offer low-income families in managing their communal affairs; and one of the important burdens of this responsibility will be to recognize arbitrariness and discrimination.

The difficulty in reconciling personal rights with community control in the cooperative can be attributed, not to an appellate procedure, but to the nature of the legal weapons that can be brought to bear against the delinquent tenant once a community decision has been made. The remedies of summary process for nonpayment and eviction for behavioral deviations are inconsistent with the values that homeownership is meant to provide for low-income families.⁶² These are the traditional remedies of the landlord—the remedies sought to be eliminated by homeownership for the poor.

Since the condominium apartment owner has fee simple title to the real property embraced by his apartment, the traditional remedies of the landlord are not available against him. The major portion of his financial obligation is owed to his mortgagee who has only the usual rights of foreclosure. The remainder of his financial obligation (his share of maintenance, insurance and the like) is owed to the association of owners, which may reserve a lien to secure its payment. Most condominium declarations, including the FHA model,⁶³ reserve a lien in favor of the association for any unpaid share of the common expenses chargeable to any family unit.⁶⁴ Under the FHA Model Statute,⁶⁵ this lien takes precedence over all others regardless of recording date, except tax liens and sums unpaid on the first mortgage of record. Failure to pay an assessment gives the association of owners the right to fore-

60. *Id.* at 609.

61. See text accompanying notes 54-55 *supra*.

62. See Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 1011 (1963).

63. FHA, ENABLING DECLARATION ESTABLISHING A PLAN FOR CONDOMINIUM OWNERSHIP (Form No. 3276-A, 1968).

64. See Berger, *supra* note 62, at 1010; Comment, *Community Apartments: Condominium or Stock Cooperative?*, *supra* note 58, at 309; Comment, *Control and Management of Common Elements by Covenant*, 14 HASTINGS L.J. 309, 313 (1963).

65. FHA, MODEL STATUTE FOR CREATION OF APARTMENT OWNERSHIP § 23 (Form No. 3285, 1962).

close on the defaulting party's interest.⁶⁶

It may be argued, however, that the owners are not well protected by a judicial foreclosure since this procedure generally takes from six to eighteen months and provides equitable protection to the mortgagor.⁶⁷ If these burdens are deemed too great on an association with expenses to meet, a power of sale can be attached to the lien in certain jurisdictions.⁶⁸ In California, for instance, a private sale can be made effective in three months,⁶⁹ thereby eliminating court costs and attorneys fees. A notice of sale will be as effective a weapon against recalcitrant owners as notice of eviction. If the defaulting party is simply unable to pay, the three month power of sale provides a period of grace commensurate with the intended advantages of homeownership. This procedure is quite unlike the three day notice of summary process.⁷⁰

The condominium association can control conduct in violation of the declaration and by-laws in a variety of ways, none of them as harsh as the eviction procedures commonly used in cooperatives. The recorded declaration can give the association or any of its members the right to recover damages for breach of covenant or nuisance and the right to injunctive relief.⁷¹ Unfortunately, nuisance actions are expensive to maintain and difficult to prove.⁷²

A far better method of enforcing house rules is to provide in the declaration for a system of fines and penalties which are assessable by the board of directors or a management body and secured by a lien on the interest of the breaching party.⁷³ Again, a power of sale would

66. The FHA Model Statute and Model Declaration provide that the list of liens having priority over association assessments may be expanded with FHA approval. See FHA, ENABLING DECLARATION ESTABLISHING A PLAN FOR CONDOMINIUM OWNERSHIP § J (Form No. 3276-A, 1968); FHA MODEL STATUTE FOR CREATION OF APARTMENT OWNERSHIP § 23 (Form 3285, 1962). For the low-income condominium, prior second mortgages and mechanic's liens should not be subordinated to the association in order that legitimate secondary borrowing and home improvement will not be discouraged. See Berger, *supra* note 62, at 1011.

67. See Comment, *Community Apartments: Condominium or Stock Cooperative?*, *supra* note 58, at 310-11.

68. E.g., CAL. CIV. CODE § 2932.

69. CAL. CIV. CODE § 2924.

70. See text accompanying note 57 *supra*; see Comment, *Community Apartments: Condominium or Stock Cooperative?*, *supra* note 58, at 309-11.

71. See FHA, ENABLING DECLARATION ESTABLISHING A PLAN FOR CONDOMINIUM OWNERSHIP § I(7) (Form No. 3276-A, 1968).

72. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 87-92 (3d ed. 1964).

73. See Comment, *Community Apartments: Condominium or Stock Cooperative?*, *supra* note 58, at 319.

provide an effective weapon against the deviant member who also refused to pay the fines assessed against him. While arbitrariness or discrimination is always a concern in a proceeding of this nature, an appeal procedure is not likely to work well. A review only of legal issues, or "clearly erroneous" fact determinations, is not likely to detect the subtleties of prejudice; a new trial, before an arbitrator, would effectively remove self-government from the community. The best protection against prejudice is a carefully selected board of directors. The virtue of the proposed penal system is that the responsibility for maintaining community harmony is in the hands of the membership and its elected representatives; and, unlike the all-or-nothing weapon of eviction, it allows a response commensurate to the magnitude of the evil.

Another method of enforcement which may be utilized in the condominium is a forfeiture of the property interest in the event of non-payment or other violation of the by-laws. Forfeiture, however, is not an enforcement technique appropriate to the low-income condominium;⁷⁴ it resembles the landlord-tenant relationship in that it denies to the low-income condominium owner the security of tenure that homeownership is intended to provide. Fortunately, forfeiture is a remedy disliked by the courts,⁷⁵ and one that is (unlike eviction in the cooperative) not likely to be chosen frequently for use in the condominium.⁷⁶

One of the great values of homeownership for low-income families is the security of tenure it affords. This security protects the homeowner against temporary financial mishap. It also provides a certain dignity which comes from the freedom to behave in a manner that does not seriously infringe on the rights of others.⁷⁷ The rights normally associated with ownership of a fee assure this security; those associated with the landlord-tenant relationship do not. Fee simple ownership of a condominium apartment, subject at most to foreclosure with power of sale upon nonpayment of assessments or penalties, will satisfactorily meet the requirements of the community while still protecting those personal rights which have long been denied low-income tenants. On the other hand, the summary process and eviction procedures avail-

74. See Berger, *supra* note 62, at 1012.

75. See 2 R. POWELL, REAL PROPERTY § 188 (1950).

76. The FHA Model Declaration does not provide for forfeiture. See FHA, ENABLING DECLARATION ESTABLISHING A PLAN FOR CONDOMINIUM OWNERSHIP (Form No. 3276-A, 1968).

77. Public housing tenants are subject to eviction by the housing authority without proof of serious misconduct. See Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642, 659-61 (1966).

able to the cooperative are the very enforcement methods which have denied the urban poor security in their homes; they threaten the most fundamental values that homeownership can offer the poor.

Control of Admission

In addition to taking action against financially delinquent or socially deviant members, the members of the community apartment must also have some way of providing that membership be extended only to persons financially responsible and socially compatible. The initial responsibility for judging applicants will belong to the developer; later, the collective owners of the community apartment will want to assure themselves that individual units will be resold to persons acceptable to the community. Here again, the requirements of the community must be balanced against the right of the individual to sell his interest to whom and for whatever price he wishes.

Community control over new members is especially important to the low-income cooperative or condominium project. Many of the families moving into new low-income community apartment projects will be coming from slum housing in which tenants used their property for any activity the market would support—from flophouses to brothels. The community apartment management will have to determine which potential homeowners show promise of compatibility and which do not.

Evidence of reasonably stable employment will also be a prerequisite of acceptance into a community apartment. Presumably, the lender or the FHA will undertake a major responsibility for certifying the financial qualifications of a potential purchaser of a condominium unit since that individual will be independently responsible for the charges on his separate mortgage loan. In the cooperative, the management will have to bear this responsibility; and of course, in a cooperative, the consequences of a mistake are much more severe for the other cooperators because they will have to assume the burden of any delinquencies.

In a condominium, the association of owners can reserve a right of first refusal; this option gives the association an effective veto power over any prospective purchaser, while still preserving for the individual owner the right to sell his apartment at fair market value.⁷⁸ Ordinarily, the owner must disclose his prospective buyer and the terms of the proposed transaction to the board before consummating a sale or lease;

78. See Berger, *supra* note 62, at 1018; Rubens, *Right of First Refusal and Waiver of the Right of Judicial Partition*, 14 HASTINGS L.J. 255 (1963); Comment, *Control of Purchasers by Pre-Emptive Option*, 14 HASTINGS L.J. 316 (1963).

the board must then, within a stated period of time, either approve the transferee or match the offer.⁷⁹ The board is given this right of first refusal, or preemptive option as it is sometimes called, in the recorded declaration or by-laws. As long as the preemptive option does not violate the rule against perpetuities,⁸⁰ it should be upheld by the courts as a reasonable restraint on alienation, in view of the degree of financial interdependence and the need for compatible members in the community apartment.⁸¹ Any further restriction, such as a limitation on resale price, would probably be invalid as applied to condominium ownership.⁸²

In the cooperative, on the other hand, stricter controls on the transfer of membership have been commonplace,⁸³ and the smaller bundle of property rights pertaining to co-op ownership have permitted the courts to uphold such controls.⁸⁴ The most extreme restrictions require the owner to return his stock and lease to the cooperative in exchange for his downpayment; others permit the cooperative to accept or reject any proposed transferee; and still others give the cooperative a right to first refusal at book value, which may be adjusted for cost of living increases.⁸⁵ While these methods are effective for controlling co-op membership, they require the individual "homeowner" to sacrifice his right to sell to any qualified person at such price as the market will support. As pointed out earlier, there is no valid reason for depriving the low-income homeowner of one of the primary advantages of homeownership—the ability to gain from an equity investment. Similarly, there is no valid reason to deprive the low-income homeowner of the freedom to consummate a private sale to a qualified successor. The stronger tenure of condominium ownership secures these personal rights.

79. See Berger, *supra* note 62, at 1017-18.

80. See Rubens, *Right of First Refusal and Waiver of the Right of Judicial Partition*, *supra* note 78, at 259; Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299, 316 n.133 (1962); Note, *The FHA Condominium: A Basic Comparison with the FHA Cooperative*, 31 GEO. WASH. L. REV. 1014, 1029 (1963).

81. See Berger, *supra* note 62, at 1017-19; Rubens, *supra* note 78, at 256-59; Comment, *Community Apartments: Condominium or Stock Cooperative?*, *supra* note 80, at 314-19.

82. See Note, *Right of First Refusal—Homogeneity in the Condominium*, 18 VAND. L. REV. 1810, 1817-20 (1965).

83. See Berger, *supra* note 62, at 1017.

84. Gale v. York Center Community Co-op, 21 Ill. 2d 86, 161 N.E.2d 30 (1960); 68 Beacon St. v. Schier, 289 Mass. 354, 194 N.E. 303 (1935); Weisner v. 791 Park Ave. Ass'n, 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 70 (1959).

85. See Berger, *supra* note 62, at 1017.

C. Other Financial Considerations

In the discussion of mortgage separability and community control, we have pointed to a number of factors of great financial significance to the low-income community apartment owner.⁸⁶ There are, however, other important financial considerations to weigh in determining the merits of condominium and cooperative apartments for low-income ownership. Of course, anything that affects the cost of homeownership is particularly important to low-income families for whom the community apartment may make homeownership financially feasible.

Personal Liability in Contract and Tort

Cooperators enjoy the limited liability of corporate shareholders. Their personal assets are insulated from third party claims arising from: (1) contractual liabilities of the corporate management; (2) torts of the management or its agents; and (3) injuries resulting from unsafe conditions on the common premises.⁸⁷ In the condominium, on the other hand, the usual governing body is an unincorporated association which affords no limitation on personal liability of the members. Moreover, depending on the jurisdiction, the members may be jointly and severally liable, with no right of contribution.⁸⁸ Hence, it would seem that the condominium would subject the low-income owner to a serious risk of personal liability which is not present in the cooperative.⁸⁹

The best protection against tort liability, of course, is insurance. Nevertheless, an accidental lapse in coverage or coverage inadequate in

86. See text accompanying notes 20-22 *supra*.

87. See H. BALLANTINE, *CORPORATIONS* 4 (rev. ed. 1946).

88. See Comment, *Community Apartments: Condominium or Stock Cooperative?*, *supra* note 80, at 313-14. But see *id.* at 314 n.112 (possible California exception on contribution).

89. One writer has advocated the incorporation of the condominium association in order to limit personal liability. See F. MECHEM, *OUTLINES OF THE LAW OF AGENCY* § 296 (4th ed. 1952). This would not save the tenants from liability, however, since a court could impose liability by treating the "corporation" as an agent of the owners. See generally F. MECHEM, *OUTLINES OF THE LAW OF AGENCY* §§ 294-99 (4th ed. 1952). Or the court could pierce the corporate veil. See generally H. BALLANTINE, *CORPORATIONS* 302-03 (rev. ed. 1946). In addition the common areas would still be owned by the members as tenants in common; since the members cannot escape responsibility by delegating their duty of reasonable care to the corporation, they would remain liable for injuries caused to third parties by unsafe conditions in these areas. F. HARPER & F. JAMES, *TORTS* § 26.11, at 1406-07 (1956); *RESTATEMENT OF TORTS* § 877(d) (1939). These latter claims are the most important ones because the corporation would not be able to mortgage any property in order to discharge a judgment; other claims against it would not likely be of such proportions as to create an important need for limited liability.

amount could leave the condominium owners unprotected from personal tort liability. Consequently, one further protection that should be given the condominium owner is the ability to clear himself and his interest in the project from further liability by paying his aliquot share of any claim or judgment for which the owners are otherwise jointly and severally liable. Although the common law allowed no contribution among joint tortfeasors,⁹⁰ condominium statutes have tried in various ways to ameliorate the harsh consequences of this rule.

The Massachusetts statute limits the liability of the individual owner for tort and contract claims to such percentage of the claim as corresponds to his percentage interest in the whole project.⁹¹ This procedure puts a burden on the claimant who must file a separate suit against each owner; however it permits the individual owner to clear the title of his interest in the project and to absolve himself of further personal liability by paying his aliquot share of a claim or judgment.

The Florida statute relieves the unit owners from liability in contract beyond the amount of common expenses assessed by the condominium association;⁹² it also relieves them of complete tort liability for "damages caused by the association on or in connection with the use of the common elements."⁹³ While it is unclear what effect the contract liability provision will have, the tort formula plainly prohibits recovery against individual owners while permitting recovery against the association of owners.

A different approach to the problems arising out of joint and several liability in the condominium has been taken by New York in the field of mechanics' liens. The New York statute deprives the mechanic of any lien on the common areas for labor performed or materials supplied;⁹⁴ it provides that the mechanic acquires the "beneficial interest in a trust whose corpus is the common charges received and to be received by the condominium managers."⁹⁵ Funds may not be expended by the management for any other purpose until the mechanic is fully paid. Thus, a mechanic has to file only one suit and is more likely to be paid through the trust arrangement than is the Florida tort claimant who apparently must "go fishing" for the association's assets. At the same

90. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 273 (3d ed. 1964).

91. MASS. ANN. LAWS ch. 183A, § 13 (Supp. 1968). The Alaska statute provides an equivalent limitation on tort claims only. ALASKA STAT. § 34.07.260 (Supp. 1969).

92. See FLA. STAT. ANN. § 711.18(1) (Supp. 1969).

93. FLA. STAT. ANN. § 711.18(2) (Supp. 1969).

94. N.Y. REAL PROPERTY LAW § 399l(2) (McKinney 1968).

95. See Berger, *Condominium: Shelter or a Statutory Foundation*, 63 COLUM. L. REV. 987, 1023 (1963).

time, title to individual apartments cannot be clouded by a lien on the common areas. However, the effect of the procedure is to create just as much interdependence among the unit owners as would a lien on the common areas, since a minority of owners cannot compel a delinquent majority to assess themselves for the claim. The association could not operate until those who were willing to pay their own shares had also paid the shares of the delinquent majority. This is the worst kind of financial interdependence.⁹⁶

A better approach to this problem is taken by the FHA Model Statute which bars a mechanic's lien on the common areas while permitting such a lien on the separate units.⁹⁷ Each apartment owner can release the lien from his estate by paying his aliquot share of the claim or judgment.⁹⁸ However, unlike the Massachusetts statute which limits absolutely the liability of the co-owner to his aliquot share, the Model Statute does not provide that the removal of a lien will discharge the unit owner's joint and several liability as an association member.

The best solution to the problem of claims against the condominium membership, whether from tort, general contract, or mechanic claimants, is a combination of the Massachusetts and the FHA Model Statutes. Liens on the individual apartments should be permitted, as in the FHA statute, to give the claimant a more effective and cheaper means of enforcing his claim;⁹⁹ but payment by a member of his aliquot share of the claim should release the lien and satisfy all liability against him arising from the claim, as in the Massachusetts statute.¹⁰⁰ The first recourse of a common creditor, however, should be against the condominium association, which should have the opportunity of assessing the membership for the claim. This would save those who are able and willing to pay the assessment the expenses of separate settlement and release of their liens.¹⁰¹

Since no state presently has an entirely satisfactory statute on the subject of common liability, the only protection for the condominium

96. For additional criticism of the New York statute see Berger, *supra* note 95, at 1023.

97. FHA, MODEL STATUTE FOR CREATION OF APARTMENT OWNERSHIP § 9(1) (Form No. 3285, 1962).

98. *Id.* § 9(2).

99. *See id.* § 9(1).

100. See text accompanying note 91 *supra*; see Berger, *supra* note 95, at 1025.

101. The Massachusetts statute clearly provides that all claims must first be brought against the organization of unit owners. MASS. ANN. LAWS ch. 183A, § 13 (Supp. 1968).

owner is incorporation and adequate liability insurance against tort claims.¹⁰² While the cooperative may in theory provide better protection against common liability than the condominium, the differences are not likely to be of great practical consequence. First, if the community apartment is large enough, the members are to some degree self-insurers and it seems unlikely that any large individual liability would arise. Second, even members of the cooperative are exposed to a risk of substantial loss—namely, whatever equity they have in the co-op by virtue of their downpayment and mortgage principal payments, plus whatever additional value their share of stock might have had.

Commercial Use

The cost of community apartment living might be significantly reduced if part of the project were opened to retail commercial use. Grocery stores, drug stores, cleaners and the like will be highly convenient for the occupants if included in a community apartment. If operated on a nonprofit basis these business establishments can reduce the cost of the items being sold to "cooperative" members, and the revenues from such commercial use can be used to offset the common monthly charges of the community apartment.

There are several ways of developing and financing commercial facilities in the community apartment. The facilities, like other common areas in the condominium, could be owned by the condominium members as tenants in common. In the co-op, the corporation could own the commercial facilities, just as it owns the rest of the project. Under either of these plans, the condominium or cooperative members would share the capital cost of the facilities in the purchase of their condominium unit or co-op stock. These members could also take on part the task for operating the stores. This is another opportunity, consistent with the concept of indigenous management, for the low-income family to take part in the management of its own affairs. Revenues from the commercial facilities could be used to offset the common expenses charged monthly by the condominium association or the co-op corporation; if the facilities were operated for profit, dividends would be paid directly to the residents.

If this investment in commercial property by the apartment owners was thought undesirable, the developer of the project could either re-

102. Kerr, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 43 (1963).

tain the commercial facilities or sell them to an investor. If the facilities were operated by a nonprofit developer on a nonprofit basis, the residents would still gain from the reduced costs of their purchases. Even if a profit were taken, the property could be assessed for some share of the expense of maintaining the common areas of the project.¹⁰³

While these alternatives are available to both the condominium and the cooperative, the condominium has important tax advantages over the cooperative in the development of commercial uses.

Income Tax Liability

Condominium and cooperative owners alike enjoy a number of the tax advantages of homeownership which, while more significant to higher income groups, are nonetheless important to anyone who pays income tax. In the cooperative, however, most of these advantages are lost if substantial commercial facilities are included in the project.

The most important tax advantage of homeownership is the ability to deduct mortgage interest charges¹⁰⁴ and real property taxes.¹⁰⁵ In addition, the homeowner's gain on the sale of his residence is taxed only to the extent that his adjusted sales price exceeds the cost of his new residence,¹⁰⁶ and if the homeowner converts his home into rental property, he may take depreciation on the property because such use is held to be for the production of income.¹⁰⁷ Since all of these provisions apply to the owners of "real property" or "residences," they apply as well to the condominium unit.¹⁰⁸

The Internal Revenue Code has a separate section dealing with the deduction of taxes, interest, and business depreciation by tenant-stockholders in a cooperative housing corporation.¹⁰⁹ The most restrictive of the provisions is the requirement that 80 percent of the gross income of the corporation must be derived from the tenant-shareholders.¹¹⁰ Thus, deductions for taxes, interest, and depreciation will be lost to the tenant-stockholders if more than 20 percent of the cooper-

103. For a general discussion of the commercial use of areas of community apartments, see Note, *Condominium: A Reconciliation of Competing Interests?*, 18 VAND. L. REV. 1773, 1780, 1788-91, 1798-1800 (1965).

104. INT. REV. CODE OF 1954, § 163(a).

105. *Id.* § 164(a).

106. *Id.* § 1034(a). "Adjusted sales tax" is defined as the amount realized, less the expenses incurred in order to assist the sale of the old residence. *Id.* § 1034(b).

107. *Id.* § 167(a)(2).

108. See Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299, 332-34 (1962).

109. INT. REV. CODE OF 1954, § 216.

110. *Id.* § 216(b)(1)(D).

ative income comes from sources other than themselves. For example, if units producing more than 20 percent of the gross income could not be sold and had to be rented, the deductions would not be allowed. Even if enough units had been sold, the tax advantages would be threatened if it suddenly became necessary for the co-op corporation to take over additional apartments by way of default or first refusal option.

With respect to the development of commercial facilities, the tax situation of the condominium is much more advantageous than that of the cooperative.¹¹¹ The above "gross income" requirement practically prohibits the inclusion of commercial facilities in the housing cooperative. A grocery store alone, if patronized by most of the residents, would be likely to have receipts far in excess of the 20 percent limit, since a family probably spends much more of its income on food than it does on housing.

One further tax advantage is enjoyed by the condominium. The condominium owner may deduct an uninsured casualty loss from his income,¹¹² whereas the tenant-stockholder in the cooperative is limited to a long-term capital loss.¹¹³

Aside from the tax obligation of the individual community apartment owner, the condominium association will probably be subject to the same tax liability as the cooperative corporation. Of course, if the condominium association were incorporated it would undoubtedly be subject to the same tax as the co-op corporation. However, even if an unincorporated membership association is used, it is likely that the association will be considered "corporate" for tax purposes. Consequently, any excess of income over expenditures will be taxed as corporate profits, rather than as the personal income of tenants in common.¹¹⁴ To the extent that annual expenditures equal annual assessments, there will be no taxable income. Thus, if the association's

111. See Note, *Condominium: A Reconciliation of Competing Interests?*, *supra* note 103, at 1791.

112. INT. REV. CODE OF 1954, § 165(c)(3).

113. *Id.* § 165(g).

114. See Note, *Condominium: A Reconciliation of Competing Interests?*, *supra* note 105, at 1795. The tax liability of the condominium association has been treated extensively in the literature on condominiums; those discussions will not be repeated here. On the subject of condominium tax liability, see generally Berger, *supra* note 95, at 1008-10; Harrison, *The FHA Condominium: Use as a Means of Meeting the Need for Moderate-Income Housing*, 11 N.Y.L.F. 458, 481-88 (1965); Comment, *Community Apartments: Condominium or Stock Cooperative?*, *supra* note 108, at 332-36; Note, *Some Income Tax Consequences of Condominiums*, 14 HASTINGS L.J. 270, 272-81 (1963); Note, *Condominium: A Reconciliation of Competing Interests?*, *supra* note 103, at 1791-98; Note, *Condominium—Tax Aspects of Ownership*, 18 VAND. L. REV. 1832 (1965).

revenues are entirely from the assessment of its members, tax liability can be avoided altogether by refunding any surplus at year's end.¹¹⁵

The most important aspect of corporate tax liability in the condominium concerns the income derived from commercial facilities and the rental of apartments owned by the association. One way to eliminate the double taxation on the income of rentals and commercial use might be to offset the operating expenses of the condominium against this commercial income. This procedure would be equally available to the co-op corporation. However, the federal courts of appeals in similar cases have differed with regard to whether or not these deductions will be allowed.¹¹⁶ The most that can be said is that it seems unlikely the Commissioner will acquiesce in the cases permitting the offsetting.¹¹⁷ Even if the expenses of maintaining the common areas could be deducted from commercial income, it is probable that under the Treasury Regulations any income so used will be assessed to the apartment owner as dividends "constructively received."¹¹⁸ Although the condominium association and the cooperative corporation may not be able to avoid the "double taxation" inherent in the corporate income tax, it may still be financially desirable for the low-income condominium to include commercial facilities in the commonly owned property.¹¹⁹ The personal income tax on constructive or actual dividends received by low-income occupants will be assessed at a low rate. In addition, the first \$25,000 of "corporate" income is taxed at the relatively low rate of 22 percent.¹²⁰

In the cooperative, however, as pointed out above, the requirement that 80 percent of co-op income be derived from tenant-stockholders in order to allow tax deductions seriously limits the feasibility of commercial development.¹²¹ While some tax liability on *extra* income may not be too serious to the low-income homeowner, added tax liability on *existing* income may be undesirable.

115. See Comment, *Community Apartments: Condominium or Stock Cooperative?*, *supra* note 108, at 335; Note, *Condominium—Tax Aspects of Ownership*, 18 VAND. L. REV. 1832, 1844 (1965).

116. Compare *Anaheim Union Water Co. v. Commissioner*, 321 F.2d 253 (9th Cir. 1963) (upholding offset), with *Chicago & W.I.R.R. v. Commissioner*, 303 F.2d 796, *rev'd on rehearing*, 310 F.2d 380 (7th Cir. 1962) (disallowing offset). For a full discussion of the question, see 1 CCH 1969 STAND. FED. TAX REP. 249.07-.08.

117. See Note, *Condominium: A Reconciliation of Competing Interests?*, *supra* note 103, at 1797.

118. TREAS. REG. § 1.451-2(a) (1957).

119. For an analysis of how this might be so with regard to a family earning from \$4,000 to \$6,000 a year, see Harrison, *supra* note 114, at 487-88.

120. INT. REV. CODE OF 1954, § 11.

121. See text accompanying notes 109-11 *supra*.

The Homestead Exemption

Since this discussion is concerned with housing low-income families, it should be pointed out that the condominium will be entitled to a homestead exemption in most jurisdictions. While the condominium interest, a fee simple determinable in the apartment and a tenancy in common in the common areas, is somewhat different from the usual homesteaded property, the generally loose language and strong policy of the homestead laws should protect the condominium interest.¹²² The cooperative apartment should be protected as well.¹²³ While it is true that mortgages executed prior to the declaration of a homestead will not be subject to the homestead exemption,¹²⁴ the homestead laws will protect the condominium or co-op interest from other creditors.¹²⁵ Of course, the condominium owner is much more likely to have some equity to protect than is the co-op owner because the latter will almost always be compelled by his fellow cooperators to refinance the project mortgage.

The above discussion indicates that both the condominium and the cooperative have important advantages over renting for the low-income family. They both permit an accumulation of equity and offer important tax advantages. Perhaps most important, both of these forms of multiple family living permit a centralization of community responsibility for property maintenance and for social discipline.

It is also clear, however, that the condominium is superior to the cooperative as a property medium for low-income homeownership. The variety of advantages flowing from the separability of the condominium apartment interest far outweighs the higher closing and servicing costs.

122. "Any interest in real estate, either legal or equitable, that gives a present right of occupancy or possession, followed by exclusive occupancy, is sufficient to support a homestead right therein." *Mainelli v. Neuhaus*, 157 Neb. 392, 398, 59 N.W.2d 607, 612 (1953). See also Cribbet, *Condominium—Home Ownership for Megalopolis*, 61 MICH. L. REV. 1207, 1235 (1963); Note, *The Condominium as Homestead Property*, 14 HASTINGS L.J. 320 (1963).

123. Even ordinary leases, which lack the proprietary interests of the co-op, have been held sufficient interests for the establishment of a homestead. *In re Foley*, 97 F. Supp. 843 (D.C. Neb. 1951) (oral month to month lease); *Rice v. United Mercantile Agencies*, 395 Ill. 512, 515, 70 N.E.2d 618, 620 (1947) (lease for years); *Panagopoulos v. Manning*, 93 Utah 198, 69 P.2d 614 (1937) (oral year to year lease).

124. *Green v. Aetna Life Ins. Co.*, 30 F.2d 100, 101 (5th Cir.), cert. denied, 279 U.S. 861 (1929); *Carey v. Matot*, 47 Cal. App. 184, 188, 190 P. 378, 380 (1920); *Willard v. Phillips*, 43 S.W.2d 170, 171 (Tex. Civ. App. 1931).

125. If the courts feel that the condominium is a fit subject for the homestead declaration, they will offer protection of the interest against creditors in the form of an exemption from forced sale or execution up to a specified amount. See, e.g., CAL. CIV. CODE §§ 1240, 1260.

In the important matter of community control, the condominium is able to satisfy community requirements while still preserving personal rights in a way much more commensurate with the values of low-income homeownership.

Finally, as to financial considerations, condominium ownership, when compared to cooperative ownership, again has advantages that outweigh any disadvantages. While there is a risk of personal liability in the condominium, it is not serious enough to be a real disadvantage. The tax advantages in the commercial use of condominium facilities can be substantial whereas commercial facilities in a co-op can create some rather serious tax problems.

Having concluded that the condominium is significantly more appropriate for low-income homeownership, we can consider the federal housing program as it influences the feasibility of developing low-income condominiums.

II. The Federal Legislation: A Survey

A number of federal programs designed to encourage the construction and rehabilitation of housing permit the use of condominiums. Some of these programs have a potential for stimulating the use of condominiums for low-income housing.

A. Section 234—Condominium Mortgage Insurance

FHA mortgage insurance for condominiums was first provided in section 234 of the National Housing Act by the Housing Act of 1961,¹²⁶ and the FHA is now authorized to insure both individual and blanket condominium mortgages. A mortgage covering a one-family unit and an undivided interest in the common areas can be insured under section 234(c) for a principal obligation up to \$30,000.¹²⁷ Ninety-seven percent of the first \$15,000 of appraised value can be insured, 90 percent of the next \$5,000, and 80 percent of any value in excess of \$20,000. The mortgage may have a maturity of up to 35 years.¹²⁸

Blanket mortgages covering multifamily condominium projects, including advances during construction, can be insured under section 234(d) for a principal obligation up to \$20,000,000 for a private mortgagor, and up to \$25,000,00 for a mortgagor supervised under federal or state law.¹²⁹ Ninety percent of the replacement cost of the

126. National Housing Act § 104, 12 U.S.C. § 1715y (Supp. IV, 1969).

127. 12 U.S.C. § 1715y(c) (Supp. IV, 1969).

128. *Id.*

129. *Id.* § 1715y(e)(1).

project, when completed, can be insured provided the principal obligation of the mortgage attributable to dwelling use (excluding exterior land improvements) does not exceed:

- (1) \$9,000 per family unit without a bedroom (\$10,500 for elevator-type);
- (2) \$12,500 per family unit with one bedroom (\$15,000 for elevator-type);
- (3) \$15,000 per family unit with two bedrooms (\$18,000 for elevator-type);
- (4) \$18,500 per family unit with three bedrooms (\$22,500 for elevator-type);
- (5) \$21,000 per family unit with four or more bedrooms (\$25,500 for elevator-type).¹³⁰

Each of these per unit amounts may be increased by as much as 45 percent in high cost areas.¹³¹

The principal obligation of the blanket mortgage may not exceed the sum of the individual mortgages insurable under section 234(c). This mortgage may bear such rate of interest as the Secretary finds the market requires,¹³² and its term may be as high as 40 years.¹³³ "The project covered by the blanket mortgage may include four or more family units and such commercial and community facilities as the Secretary deems adequate to serve the occupants."¹³⁴

B. Section 235—Mortgage Insurance and Assistance Payments for Low-Income Families

Section 235 of the National Housing Act is designed to encourage homeownership for "lower income" families¹³⁵ and could, if adequately funded, put condominium units within the reach of families having incomes between \$3,000 and \$7,000.¹³⁶ This section provides mortgage insurance and federal mortgage assistance payments for mortgages that meet certain requirements.

Section 235(i)—Insurance for Individual Mortgages

A one-family unit in a condominium project together with an undivided interest in the common areas can receive mortgage insurance

130. *Id.* § 1715y(e)(3).

131. *Id.*

132. *Id.* § 1709-1.

133. National Housing Act § 234(f), 12 U.S.C. § 1715y(f) (Supp. IV, 1969).

134. *Id.*

135. See 12 U.S.C. 1715z(a) (Supp. IV, 1969).

136. 1968 *Hearings* pt. 1, at 67. In high cost urban areas these figures are higher.

under section 235(i) if the construction (or substantial rehabilitation) of the project has been completed within the previous two years and if the unit has had no previous occupant other than the mortgagor. The mortgage may cover a family unit in an existing condominium project, without regard to recent construction or rehabilitation, under the following circumstances: (1) if the mortgagor qualifies as a displaced family, a family that includes five or more minor persons, or a family occupying low-rent public housing; (2) if assistance payments have been made on behalf of the previous owner of the dwelling unit with respect to a mortgage insured under section 235(j)(4);¹³⁷ or (3) if the mortgage involves a dwelling unit in an existing project covered by a mortgage insured under section 236,¹³⁸ or a project for which rent supplement payments have been made under section 101 of the Housing and Urban Development Act of 1965.¹³⁹ Twenty-five percent of the amount of contracts made before July 1, 1969, can apply to existing housing, 15 percent in the following year, and 10 percent in the third year.¹⁴⁰

A mortgage covering a one-family unit in a condominium project may be insured under section 235(i) if its principal obligation does not exceed \$15,000, or \$17,500 in high-cost areas. These limits are raised to \$17,500 and \$20,000 respectively, for any family with five or more persons.¹⁴¹

In order to receive mortgage insurance under section 235(i), a family must make a minimum downpayment of \$200 if its income is not above 135 percent of the maximum income limits that can be established in the area for initial occupancy in public housing. Any other family must make a minimum downpayment of at least 3 percent of the cost of acquisition.¹⁴²

137. See text accompanying notes 151-52 *infra*. The National Housing Act § 235(j)(4), 12 U.S.C. § 1715z(j)(4) (Supp. IV, 1969), provides mortgage insurance for nonprofit and public mortgagors purchasing, rehabilitating and selling housing to low-income families.

138. 12 U.S.C. § 1715z-1 (Supp. IV, 1969).

139. *Id.* § 1701s.

140. *Id.* § 1715z(h)(3).

141. *Id.* § 1715z(i)(3)(B).

142. The requirements for initial occupancy in public housing are set forth in the Housing Act of 1937, §§ 2(2), 15(7)(ii), 42 U.S.C. §§ 1402(2), 1415(7)(b)(ii) (Supp. IV, 1969). These provisions: (1) limit initial occupancy of public housing to those families who cannot afford to pay enough to cause private industry in the area to build them standard housing; and (2) require a 20 percent gap (except for displaced or elderly families) between the upper rental limits for admission to public housing and the lowest rents at which private enterprise unaided by public subsidy is providing a substantial supply of standard housing.

Section 235(i) also provides that condominium unit mortgages must meet such requirements of section 234(c)¹⁴³ as are not modified by its own terms. Thus, the 35 year maximum term of section 234(c) applies to section 235 (i) mortgages.

Section 235(j)(1)—Blanket Mortgage Insurance and Assistance Payments for Non-Profit and Public Purchasers

Section 235(j)(1) authorizes blanket mortgage insurance for mortgages executed by a nonprofit organization or public body to finance the purchase of housing for subsequent resale to "lower income" purchasers and also for rehabilitation of such housing if it is substandard or deteriorating.¹⁴⁴ Four or more one-family units in a structure or structures for which a plan of family unit ownership is established may be eligible for blanket mortgage insurance under section 235(j)(1). If rehabilitation of deteriorating or substandard housing is not involved, the property purchased may consist of one or more units.¹⁴⁵

One hundred percent financing of the appraised value of the property when purchased plus the estimated cost of any rehabilitation is insurable.¹⁴⁶ The blanket mortgage bears interest at such rate, not in excess of 6 percent, as the Secretary finds necessary to meet the mortgage market.¹⁴⁷ No blanket mortgage will be insured under section 235(j)(1) unless

(A) the property involved is located in a neighborhood which is sufficiently stable and contains sufficient public facilities and amenities to support long-term values, or (B) the purchase or rehabilitation of such property plus the mortgagor's related activities and the activities of other owners of housing in the neighborhood, together with actions to be taken by public authorities, will be of such scope and quality as to give reasonable promise that a stable environment will be created in the neighborhood.¹⁴⁸

Finally, the mortgagor, to obtain blanket mortgage insurance under section 235(j)(1), must agree to offer to sell the units to lower income families.¹⁴⁹

The nonprofit or public mortgagor, in addition to blanket mort-

143. See text accompanying notes 131-34 *supra*.

144. 12 U.S.C. § 1715z(j)(1) (Supp. IV, 1969).

145. *Id.* § 1715z(j)(3).

146. National Housing Act § 235(j)(2)(B), 12 U.S.C. § 1715z(j)(2)(B) (Supp. IV, 1969).

147. *Id.* § 235(j)(2)(C), 12 U.S.C. § 1715z(j)(2)(C) (Supp. IV, 1969).

148. *Id.* § 235(j)(3), 12 U.S.C. § 1715z(j)(3) (Supp. IV, 1969).

149. *Id.* § 235(j)(4), 12 U.S.C. § 1715z(j)(4) (Supp. IV, 1969).

gage insurance, is also eligible for mortgage assistance payments; this amount cannot exceed the difference between the monthly payment for principal, interest, and mortgage insurance premium which the mortgagor is obligated to pay under the mortgage and the monthly payment for principal and interest such mortgagor would be obligated to pay if the mortgage were to bear interest at the rate of 1 percent per annum.¹⁵⁰

Section 235(j)(4)—Mortgage Insurance for Sale of Individual Units by Nonprofit and Public Groups

In addition to blanket mortgage insurance for nonprofit and public mortgagors, and mortgage assistance on their behalf, section 235(j) provides insurance for mortgages executed to finance the sale of individual units.¹⁵¹ One hundred percent financing of the unpaid balance on the blanket mortgage covering the individual dwelling involved is also insurable. The individual mortgage bears interest at the same rate as the blanket mortgage (not in excess of 6 percent). A minimum of \$200, not included in the mortgage, must be paid by the purchaser toward closing costs. No mortgage covering property that is not deteriorating or substandard may be insured under section 235(j) unless situated in an area in which mortgages may be insured under section 221(h)¹⁵²—in an urban renewal, redevelopment or code enforcement area.

Mortgage Assistance Payments for Individuals

For the purpose of assisting low-income families in acquiring a home, section 235 provides periodic assistance payments to mortgagees. Assistance payments under this section cannot exceed the difference between the required monthly mortgage payment for principal, interest, taxes, insurance and mortgage insurance and 20 percent of the family's monthly mortgage payment for principal and interest which would have been required if the mortgage were to bear interest at the rate of 1 percent.¹⁵³

The Secretary is authorized to prescribe regulations to assure that the price paid by the purchaser of a dwelling does not exceed the appraised value on which the maximum mortgage which the Secretary will

150. *Id.* § 235(j)(7), 12 U.S.C. § 1715z(j)(7) (Supp. IV, 1969).

151. 12 U.S.C. § 1715z(j)(3)(C)-(E) (Supp. IV, 1969).

152. *Id.* § 1715l(h). See text accompanying notes 175-87 *infra*.

153. National Housing Act § 235(c), 12 U.S.C. § 1715z(c) (Supp. IV, 1969).

insure is computed.¹⁵⁴

Finally, section 235 authorizes assistance payments not exceeding \$75,000,000 per annum prior to July 1, 1969, with an increase of \$100,000,000 for the fiscal year ending July 1, 1970, and a further increase of \$125,000,000 for the next fiscal year.¹⁵⁵

Section 235(b)—Eligibility Requirements for Mortgage Insurance and Assistance Payments

In order to qualify for mortgage insurance and mortgage assistance payments under section 235, the prospective condominium occupant must be "of lower income."¹⁵⁶ Preference is to be given to those families whose incomes are within the lowest practicable limits for achieving homeownership with assistance under section 235.¹⁵⁷ No more than 20 percent of the total amount of assistance payments may be made on behalf of families whose incomes, at the time of their initial occupancy, exceed 135 percent of the maximum income limits established in the area for initial occupancy of public housing.¹⁵⁸ In no case may the incomes of families eligible for section 235 assistance exceed, at the time of their initial occupancy, 90 percent of the limits prescribed by the Secretary of Housing and Urban Development for occupants of section 221(d)(3) below market interest rate projects.¹⁵⁹ In determining the income of any family for the purposes of section 235, \$300 may be deducted for each minor person in the family and any income of such a minor is disregarded.¹⁶⁰

To qualify for mortgage assistance, the mortgage must meet the requirements set forth in sections 235(i)¹⁶¹ or 235(j)(4)¹⁶² for mortgage insurance. However, section 235(b)¹⁶³ relaxes the customary FHA credit requirements by permitting persons holding mortgages insured under section 237¹⁶⁴ to qualify for assistance payments.

154. *Id.* § 235(g), 12 U.S.C. § 1715z(g) (Supp. IV, 1969).

155. *Id.* § 235(h)(1), 12 U.S.C. § 1715z(h)(1) (Supp. IV, 1969).

156. *Id.* § 235(b), 12 U.S.C. § 1715z(b) (Supp. IV, 1969).

157. *Id.* § 235(h)(2), 12 U.S.C. § 1715z(h)(2) (Supp. IV, 1969).

158. 12 U.S.C. § 1715z(h)(1) (Supp. IV, 1969).

159. *Id.* § 1715l(d)(2)(iii).

160. *Id.* § 1715z(1).

161. See text accompanying notes 142-43 *supra*.

162. See text accompanying note 151 *supra*.

163. 12 U.S.C. § 1715z(b) (Supp. IV, 1969).

164. *Id.* § 1715z-2. See text accompanying note 188 *infra*.

C. Section 220—Loan and Mortgage Insurance for Construction and Rehabilitation of Residential Urban Property

Section 220 provides a system of loan and mortgage insurance designed to assist the financing required for the construction and rehabilitation of residential property located in urban renewal, redevelopment, or code enforcement areas.¹⁶⁵ The loan and mortgage insurance provisions of this section appear to be available for use in both the construction and rehabilitation of condominiums. The statute does not explicitly provide insurance for condominium mortgages. Condominium unit owners, however, should qualify generally as owners and potential mortgagors of their own individual apartment units; and together they should qualify generally as owners and potential mortgagors of their undivided interest in the common areas of the dwelling facilities. Section 220(d) provides that a mortgage obligation for multifamily housing may

include such non-dwelling facilities as the Secretary deems desirable and consistent with the urban renewal plan: *Provided*, That the project shall be predominantly residential and any non-dwelling facility included in the mortgage shall be found by the Secretary to contribute to the economic feasibility of the project, and the Secretary shall give due consideration to the possible effect of the project on other business enterprises in the community.¹⁶⁶

The wording of this provision would seem to refer not only to landscaping, playgrounds and the like, but to commercial facilities as well. Since the statute governing structures intended for one to four families does not provide mortgage insurance explicitly for non-dwelling facilities,¹⁶⁷ it must be assumed that this is not available.

Section 220(h) provides for insurance on "home improvement loans" used for rehabilitation or improvement of residential property located in urban renewal or code enforcement areas.¹⁶⁸ The loans may also be used for that share of the cost of public improvements near the property as the borrower is legally obligated to pay as owner of that property.¹⁶⁹ The statute does not explicitly provide for insurance on loans made to finance improvements to condominiums. However, as in the case of mortgage insurance granted under section 220,¹⁷⁰ condominium unit owners should qualify for home improvement loans individually as owners of their separate apartment units and together as

165. National Housing Act § 220, 12 U.S.C. § 1715k (Supp. IV, 1969).

166. 12 U.S.C. § 1715k(d)(3)(B)(iv) (Supp. IV, 1969).

167. *Id.* § 1715z(i)(2)-(3).

168. National Housing Act § 220(h), 12 U.S.C. § 1715k(h) (Supp. IV, 1969).

169. *Id.*

170. See text accompanying notes 165-66 *supra*.

owners of an undivided fee interest in the common areas. The statute does not provide for insurance on loans used to finance the improvement of nondwelling facilities (except the pro rata share of public improvements) and loan insurance for this purpose must therefore be considered unavailable.

D. Section 221—Assistance to Sponsors and Developers of Low- and Moderate-Income Housing

Section 221 of the National Housing Act¹⁷¹ authorizes a system of mortgage insurance and subsidized interest rates designed to assist private industry in providing housing for low- and moderate-income families and displaced persons. With the amendments of the Housing and Urban Development Act of 1968, section 221 should encourage private industry to build condominiums for low-income families.

Section 221(i)—Conversion of BMIR Projects to Condominiums

Prior to 1968, the section 221(d)(3) program authorized insurance on blanket mortgages that: (1) bore interest at a rate of 3 percent; (2) were purchased by FNMA's Special Assistance Fund; (3) were executed by a mortgagor who was a public body or agency, a cooperative, a limited dividend corporation or a private nonprofit corporation or association; and (4) were used for the construction of rental or cooperative housing whose occupancy would be restricted to low- and moderate-income persons.¹⁷² The 1968 Act amends section 221 to permit below-market-interest-rate (BMIR) projects to be converted to condominiums.¹⁷³ Section 221(i) authorizes conversion under a plan permitting each family unit, together with an undivided interest in the common areas and facilities which serve the project, to be eligible for sale to low- or moderate-income purchases. It authorizes the Secretary to insure mortgages financing the purchase of former section 221(d)(3) units pursuant to an appropriate conversion plan. The mortgage must be executed by a mortgagor having an income within the limits prescribed for section 221(d)(3) BMIR projects; it must also involve a principal obligation not exceeding the appraised value of the family unit plus the mortgagor's interest in the common areas and facilities. The mortgage can bear interest as low as the below market 3 percent rate or higher, depending on the income of the mortgagor. The maximum mortgage term is 40 years and the purchaser must make

171. 12 U.S.C. § 1715l (Supp. IV, 1969).

172. *Id.* § 1715l (1964).

173. *Id.* § 1715l (1964), as amended, 12 U.S.C. § 1715l(i) (Supp. IV, 1969).

a downpayment of at least 3 percent of the purchase price, which amount may be applied toward closing costs. The principal obligation of the mortgage may cover such commercial, community, and other facilities as are approved by the Secretary.¹⁷⁴

Section 221(h)—Assistance to Nonprofit Groups Rehabilitating Low-Income Housing

Section 221(h)¹⁷⁵ is similar to section 235(j)¹⁷⁶ and authorizes the insurance of: (1) blanket mortgages executed by nonprofit organizations to finance the purchase and rehabilitation of deteriorating or substandard housing for subsequent resale to low-income home purchasers; (2) individual mortgages executed by low-income families to finance the purchase of individual dwellings from the nonprofit group holding the blanket mortgage; and (3) individual mortgages executed to finance the rehabilitation or improvement of single-family dwellings purchased by low-income families from nonprofit organizations. The 1968 amendments to section 221(h) make the mortgage insurance provisions of this subsection available to nonprofit groups who are engaged in rehabilitating housing for sale as condominium units to low-income persons.¹⁷⁷

Section 221(h)(1)¹⁷⁸ authorizes the insurance of blanket mortgages executed by nonprofit organizations to finance the purchase and rehabilitation of deteriorating or substandard housing for subsequent resale to low-income home purchasers. The blanket mortgage may cover "four or more one-family units in a structure or structures for which a plan of family unit ownership approved by the Secretary is established."¹⁷⁹ The principal obligation of the mortgage may not exceed the appraised value of the property plus the estimated cost of rehabilitation. The mortgage bears interest at the BMIR rate of section 221(d)(3) mortgages.¹⁸⁰ The mortgaged property must be located

174. The program has been a relatively popular one with builders, but has been regularly criticized for low mortgage obligation limits, red tape, and long waiting periods in the application process. For a discussion of this program, see C. ABRAMS, *THE CITY IS THE FRONTIER* 170-75 (1965); Note, *Government Housing Assistance to the Poor*, 76 *YALE L.J.* 508, 515-18 (1967).

175. 12 U.S.C. § 1717l(h) (Supp. IV, 1969).

176. See text accompanying notes 144-50 *supra*.

177. 12 U.S.C. § 1715l(h)(2)(A) (Supp. IV, 1969), amending 12 U.S.C. § 1715l(h) (1964).

178. *Id.* § 1715l(h)(1).

179. National Housing Act § 221(h)(2)(A)(ii), 12 U.S.C. § 1715l(h)(2)(A)(ii) (Supp. IV, 1969).

180. See text accompanying notes 172-74 *supra*.

in a neighborhood which appears, either at the present or in the future, to be capable of supporting stable long-term property values. The insurance of mortgages totalling \$50,000,000 at any one time is now authorized.¹⁸¹

The nonprofit mortgagor must offer to sell to low-income individuals or families eligible for rent supplements. The qualifications for rent supplements require a person: (1) to have an income below the maximum amount that can be established in the area for public housing;¹⁸² and (2) to be one of the following: (a) displaced by government action or natural disaster; (b) 62 years of age or older; (c) physically handicapped; or (d) occupying substandard housing.¹⁸³

Section 221(h)(5)¹⁸⁴ authorizes mortgage insurance as a means of financing the sale of individual condominium units from nonprofit organizations holding a section 221(h)(1) blanket mortgage to low-income purchasers meeting the eligibility requirements set forth in the last paragraph. The principal amount of the mortgage may equal 100 percent of the property insured under section 221(h)(1) and may be allocated to the individual dwelling and its share of the undivided interest in the common areas.

The individual mortgage bears interest at such rate between the section 221(d)(3) BMIR rate and 1 percent as is justified by the income of the purchaser. If the rate initially prescribed is less than the BMIR rate, the prescribed rate may rise with increases in the mortgagor's income. If the low-income mortgagor does not continue to occupy the property, the interest rate will also rise unless the property is sold to the nonprofit group that executed the blanket mortgage, a public housing agency having jurisdiction over the area, or another eligible low-income purchaser.

A condominium unit sold pursuant to section 221(h)(5) may also be insured under section 235(j)(4).¹⁸⁵ Such a mortgage would not only bear interest at the market rate provided in section 235(j)(2)(C),¹⁸⁶ but it would also be eligible for mortgage assistance payments if the requirements of section 235(b)¹⁸⁷ were met.

181. 12 U.S.C. § 1715l(h)(4) (Supp. IV, 1969).

182. See note 142 *supra*.

183. 12 U.S.C. § 1701s(c)(2) (Supp. IV, 1969).

184. *Id.* § 1715l(h)(5).

185. See text accompanying notes 151-52 *supra*.

186. 12 U.S.C. § 1715z(j)(2)(C) (Supp. IV, 1969). Under this section, the mortgage shall "bear interest . . . not to exceed such per centum per annum (not in excess of 6 per centum), on the amount of the principal obligation outstanding at any time, as the Secretary finds necessary to meet the mortgage market"

187. See text accompanying notes 156-64 *supra*.

E. Sections 237 and 223(e)—Relaxation of Mortgage Insurance Requirements

The low-income family is much more likely to qualify for the various mortgage insurance programs since sections 237¹⁸⁸ and 223(e)¹⁸⁹ were added to the National Housing Act of 1968. Section 237 authorizes mortgage insurance for those families of low and moderate income who cannot qualify under existing FHA housing programs because of their credit histories or irregular income patterns, but who are nonetheless reasonably satisfactory credit risks and capable of homeownership with the assistance of budget, debt management, and related counseling. Section 223(e) permits the FHA to insure mortgages in older, declining urban areas which normally would not qualify under the existing programs. The property to be insured must be an "acceptable risk." In determining if the property is an acceptable risk, consideration must be given to the need for providing housing for low- and moderate-income families in the area.

F. Purchase of Public Housing Units

Prior to 1968, public housing tenants were permitted to purchase only "detached or semidetached" units.¹⁹⁰ The Housing and Urban Development Act of 1968 permits local housing authorities to sell any low-rent housing unit to a tenant if such a unit is "sufficiently separable from other property retained by the public housing agency to make it suitable for sale and for occupancy by such purchaser"¹⁹¹ While the former language did not encourage the sale of units as cooperatives or condominiums, the House and Senate reports on the 1968 legislation state explicitly that the new wording is intended to embrace the sale of apartments as cooperative or condominium units.¹⁹² Still, the wording tends to discourage the sale of units in highrise buildings and provides the local authority with an excuse for not selling its low-rent units. Nonetheless, it should be possible for public housing tenants who have sufficiently high incomes to purchase public housing units as condominium apartments, especially since mortgage assistance under sec-

188. 12 U.S.C. § 1715z-2 (Supp. IV, 1969).

189. *Id.* § 1715n(e).

190. Act of Aug. 10, 1965, Pub. L. No. 89-117, § 507(a), 79 Stat. 487.

191. 42 U.S.C. § 1415(9) (Supp. IV, 1969).

192. H.R. REP. No. 1585, 90th Cong., 2d Sess. 29-30 (1968); S. REP. No. 1123, 90th Cong., 2d Sess. 31-32 (1968). Senator Tydings introduced legislation which would have lowered the cost of purchasing public housing units and also removed all restrictions on the type of units which could be sold. His proposals were not adopted. 1968 *Hearings, supra* note 3, at 647-73, 1105-15.

tion 235 is available to them even though the building is not new.¹⁹³

G. Rehabilitation Grants and Loans

The condominium owner may qualify, as an owner and occupier of real property, for a HUD rehabilitation grant.¹⁹⁴ These grants are available in any urban area where the locality has plans for substantial rehabilitation.¹⁹⁵ The grants are available for bringing substandard or uninsurable property up to decent housing requirements and may be made in the amount of \$3,000 to families earning no more than \$3,000 per year. Moreover, since the 1968 Act, the grants are available for rehabilitation of both the individual apartment units and the common areas of a condominium project.

The condominium owner may also qualify for a rehabilitation loan.¹⁹⁶ The loans, like the rehabilitation grants, are now available in any urban area where the locality has plans for substantial rehabilitation. They may be made to any family whose income is low enough to qualify for a section 221(d)(3) BMIR project.¹⁹⁷ The term of the loan may not exceed 20 years and the interest rate may not exceed three percent. As in the case of grants, the loans should be available for the common areas of a condominium project as well as for the individual apartments.

H. The Federal National Mortgage Association

The operations of the old Federal National Mortgage Association (FNMA), as well as the new Government National Mortgage Association (GNMA), have a potential for encouraging condominium development for low-income families. For example, section 234 and 235 condominium mortgages, blanket and individual, are eligible for FNMA's secondary market purchases.¹⁹⁸ These individual condominium mortgages can be financed by GNMA's special assistance authority.¹⁹⁹ However, there is no authority for GNMA to purchase condominium blanket mortgages under sections 234 and 235.²⁰⁰

193. National Housing Act § 235(i)(3), 12 U.S.C. § 1715z(i)(3) (Supp. IV, 1969).

194. See 42 U.S.C. § 1466(a)(1) (Supp. IV, 1969).

195. *Id.* § 1466(a)(2).

196. *Id.* § 1452b.

197. See text accompanying notes 171-74 *supra*.

198. National Housing Act § 306, 12 U.S.C. § 1721 (Supp. IV, 1969); 2 CCH 1969 FED. BANK LAW REP. ¶ 25,536, at 11,773.

199. National Housing Act § 305(g), 12 U.S.C. § 1721 (Supp. IV, 1969).

200. GNMA does have authority to purchase blanket mortgages on cooperative projects. 12 U.S.C. § 1720(e) (1964).

III. Conclusion

Homeownership is not a solution to all the housing problems of the urban poor. Indeed, even the radically new federal mortgage assistance program is not expected to reach families with incomes below \$3,000;²⁰¹ yet, more than half the substandard housing units in urban areas are occupied by families with incomes below that level. Nevertheless, homeownership for the moderately poor urban family is clearly contemplated by the new federal program and appears well-suited to counteracting the circular dilemma of disrepair and eviction around which slum landlords and their tenants have been revolving. Even with the \$3,000 limit, it is clear that homeownership will be possible for more than a million low-income families during the next decade.²⁰² The choice of a property vehicle that can best provide this homeownership for low-income urban families is crucial.

Accepting the inevitability of multiple family buildings on today's crowded urban land, this article has attempted to show that the condominium is a better form of property tenure for the low-income urban family than the cooperative. A variety of advantages to the low-income homeowner were found to flow from the separability of the fee interest in the condominium and from the greater protection of personal rights which that fee secures. We noted certain other financial advantages which the condominium can offer low-income families. Moreover, we argued that the communal nature of multiple family living—whether condominium or cooperative—has important advantages for new homeowners.

Although not at all a common form of property tenure in this country prior to 1960,²⁰³ and still lacking the strong institutional support of a Cooperative League,²⁰⁴ the condominium has certainly received its share of attention by legal scholars and has now been fully integrated into the federal programs designed to encourage homeowner-

201. See 1968 *Hearings*, *supra* note 3, pt. 1, at 67.

202. See *id.* pt. 2, at 1321.

203. See Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987-89 (1963). The history of the condominium principle has been traced to the Romans; statutes in Europe and South America have long authorized condominium development. See generally Ross, *Condominium in California—The Verge of an Era*, 36 S. CAL. L. REV. 351 (1963).

204. Dwight D. Townsend of the Cooperative League of the United States has been a frequent advocate of cooperative legislation before congressional committees. Moreover, he opposed condominium mortgage insurance in 1961, *Hearings on Housing Legislation of 1961 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 87th Cong., 1st Sess. 474 (1961), and continues to oppose condominiums for low- and moderate-income groups. 1968 *Hearings*, *supra* note 3, pt. 1, at 119-20.

ship by low-income families. Moreover, states are rapidly adapting their real property laws to make condominium development more feasible.²⁰⁵ Hence, if the sponsors and builders of tomorrow's low-income housing are willing to try something just a little new, they will find the condominium an excellent product for the low-income homeowner.

205. All the states have now passed condominium statutes. Forty-nine are counted in Walbran, *Condominium: Its Economic Functions*, 30 Mo. L. Rev. 531, 565 (1965). Montana, the fiftieth state, has now passed condominium legislation. REV. CODE MONT. § 67-2301 (Supp. 1969).